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No. 05-998

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUAN RESENDIZ-PONCE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

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INTRODUCTION

Respondent, Juan Resendiz-Ponce, respectfully submits this supplemental brief in response to the Court's Order of October 13, 2006, directing the parties to address the following question: "Did the indictment omit an allegation that was required by the Fifth Amendment?" Respondent submits that it did. At issue is whether the government's indictment was defective for failure to allege an overt act that furthered Respondent's alleged attempted illegal reentry into the United States. That question can be answered in two ways: (1) by addressing the necessity to plead elements of an offense in an indictment; and (2) by addressing what those elements are for an attempt prosecution pursuant to 8 U.S.C. § 1326. Consequently, Respondent's brief first will address why an indictment under section 1326(a) must contain an overt act constituting a substantial step towards completion of the alleged attempted reentry. Secondly, even though the government has not challenged the Ninth Circuit's formulation of the essential elements of attempted reentry under section 1326 to include an overt act that is a substantial step towards reentry, Respondent's brief will also address the necessary elements of section 1326, even though that question was not raised below or, until now, before this Court.

I. WHERE A STATUTE CONTAINS GENERIC TERMS SUCH AS "ATTEMPT" THE FIFTH AMENDMENT REQUIRES ALLEGATIONS OF BOTH SPECIFIC INTENT AND AN OVERT ACT WHICH CONSTITUTES A SUBSTANTIAL STEP TOWARDS COMPLETION.

A. The Fifth Amendment Requires That Indictments Set Forth The Essential Elements Of The Offense(s) Charged

The Fifth Amendment's indictment requirement serves three important purposes: (1) to guarantee that defendants are apprised of the crime(s) with which they are charged; (2) to protect defendants against later prosecution for the same

offense; and (3) to ensure that defendants are tried only on charges returned by the grand jury in the indictment. *See Russell v. United States*, 369 U.S. 749, 763-64 (1962); *United States v. Miller*, 471 U.S. 130, 140 (1985); *Stirone v. United States*, 361 U.S. 212, 216-17 (1960). *See also Hamling v. United States*, 418 U.S. 87, 117 (1974); *United States v. Debrow*, 346 U.S. 374, 376 (1953); *Hagner v. United States*, 285 U.S. 427, 431-32 (1932).

An indictment satisfies its apprisal or notice function when it "'contains the elements of the offense intended to be charged.'" *Russell*, 369 U.S. at 763 (internal citation omitted); *see also* 1 Charles Alan Wright, *Federal Practice and Procedure* § 125 (3d ed. 1999 & Supp. 2006). This Court's decision in *Russell* re-affirmed the holdings in a long-standing line of cases requiring that, regardless of whether an offense is defined at common law or by statute, if the definition "'includes generic terms, it is not sufficient that the indictment shall charge the offence in the same generic terms as in the definition; but it must state the species, – it must descend to particulars.'" *Russell*, 369 U.S. at 765 (citing *United States* v. *Cruikshank*, 92 U.S. 542, 558 (1875)); *see also Batchelor v. United States*, 156 U.S. 426, 429 (1895); *United States v. Hess* 124 U.S. 483, 486 (1888); *Ex Parte Virginia*, 100 U.S. 339, 351-52 (1879) (Field, J., dissenting); *United States v. Simmons*, 96 U.S. 360, 362 (1877); J. Archbold, *Pleading and Evidence in Criminal Cases* 88 (15th ed. 1862). To be sure, the Federal Rules of Criminal Procedure "encourage succinct criminal pleadings" but the Court requires more when the statute at issue contains generic terms; thus, the "descend to particulars" language demands that the prosecution do more than parrot statutory language or general common law terms. Instead, the prosecution must, at a minimum, identify the manner and means by which the defendant violated the statute. *United States v. Stavroulakis*, 952 F.2d 686, 693 (2d Cir. 1992) (citing Fed. R. Crim. P. 7(c)(1) and 1 Wright & Miller, *Federal Practice and Procedure* § 123, at 346-47 (2d ed. 1982)).

Even where a statute does not contain generic terms, "succinct pleading" requirements do not allow prosecutors to simply regurgitate statutory language and demand that the defense (through discovery and motions) and the courts (through resolution of those motions) extract those essential specifics. *See Russell*, 369 U.S. at 770 ("a bill of particulars cannot save an invalid indictment"). "[I]t is not sufficient to set forth the offence in the words of the statute, unless those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished ...." *United States v. Carll*, 105 U.S. 611, 612 (1881). Although the statutory language may be used to provide the "general description of an offense, ... it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *Hess*, 124 U.S. at 487. Thus, any determination of the constitutionality of an indictment under the Fifth Amendment must begin with an examination of the elements of the offense charged.

B. The Essential Elements Of Criminal Attempt Are Specific Intent And An Overt Act That Constitutes A Substantial Step In Furtherance Of The Offense.

Since its inception, the crime of attempt has required a showing of both intent and action. As far back as medieval law, a defendant could not be found guilty of attempt unless he had "manifested his intent 'by some open deed tending to the execution of his intent.'" 2 Wayne R. LaFave, *Substantive Criminal Law* § 11.2, at 205 & n.4 (2d ed. 2003) (citing E. Coke, *Third Institute* 5 (1644)). This requirement of intent plus overt act[1] has carried through to the modern

[1] An overt act consists of "'an act or omission constituting a substantial step.'" Am. Law Inst., *Model Penal Code* § 5.01(1)(c) (1962); *see also United States v. Yang*, 281 F.3d 534, 543 (6th Cir. 2002) (defining attempt

day. Criminal attempt requires: "(1) an intent to do an act or to bring about a certain consequence which would in law amount to a crime; and (2) an act in furtherance of that intent." *Id.* § 11.3, at 211. The common law definition of attempt, therefore, has long required and continues to require that a defendant have specific intent to engage in criminal conduct and to engage in an overt act "'which is a substantial step towards committing the crime.'" *United States v. Gracidas-Ulibarry*, 231 F.3d 1188, 1192 (9th Cir. 2000) (en banc); *accord United States v. Figueroa*, 976 F.2d 1446, 1459 (1st Cir. 1992); *United States v. Manley*, 632 F.2d 978, 987 (2d Cir. 1980); *United States v. Mandujano*, 499 F.2d 370, 376 (5th Cir. 1974). This Court, too, has recognized that use

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as: "(1) an intent to engage in criminal activity, and (2) the commission of an overt act constituting a substantial step towards the commission of the substantive offense"); *Black's Law Dictionary* 137 (8th ed 2004) (defining attempt as "[a]n overt act that is done with the intent to commit a crime but that falls short of completing the crime").

The requirement of alleging an overt act also exists in the context of conspiracy. The elements of common law conspiracy are: "(1) an agreement between two or more persons, which constitutes the act; and (2) an intent thereby to achieve a certain objective which, under the common law definition, is the doing of either an unlawful act or a lawful act by unlawful means." 2 LaFave, *supra* § 12.2, at 265. Today, many statutes require a showing of an additional overt act, separate and apart from the agreement itself. *See, e.g.*, 18 U.S.C. § 371 (explicitly requiring that a conspirator "do any act to effect the object of the conspiracy"); 18 U.S.C. § 1511(a)(1) (requiring that "one or more of [the conspirators] does any act to effect the object of such a conspiracy"). Where a statute requires an additional overt act, the prosecution must set forth that act in the indictment. *See e.g.*, *United States v. McDade*, 28 F.3d 283, 300 (3d Cir. 1994) (addressing an indictment under 18 U.S.C. § 371); *Hudspeth v. McDonald*, 120 F.2d 962, 965 (10th Cir. 1941) (finding that for a prosecution under § 371, "it is necessary to allege and prove an overt act"). If an indictment for conspiracy, which "'attacks inchoate crime at a far more incipient stage [than attempt],'" *United States v. Nichols*, 169 F.3d 1255, 1274 (10th Cir. 1999), must allege an overt act, then it logically follows that an indictment for attempt, for which the overt act takes on greater significance as it must illustrate a substantial step towards completion of the crime, must also allege an overt act.

of the term "attempt" in a statute necessarily requires a showing of a substantial step, regardless of whether the statute is derived from the common law. *See, e.g.*, *Braxton v. United States*, 500 U.S. 344, 349 (1991) (attempted murder); *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993) (attempted monopolization requires an act beyond mere preparation) (citing *Swift & Co. v. United States*, 196 U.S. 375, 402 (1905)).

1. Intent. Criminal attempt is a specific intent crime. "Under the prevailing view, an attempt thus cannot be committed by recklessness or negligence or on a strict liability basis, even if the underlying crime can be so committed." 2 LaFave, *supra* § 11.3, at 211. *See also United States* v. *Bailey*, 444 U.S. 394, 405 (1980) (noting that "inchoate offenses such as attempt and conspiracy" require a showing of specific intent); 4 Charles E. Torcia, *Wharton's Criminal Law* § 695, at 591-97 (15th ed. 1996).

Although seemingly counter-intuitive, a heightened *mens rea* requirement for attempt serves a valuable purpose, even when, as here, the completed crime requires only general intent. The requirement removes "the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct." *Gracidas-Ulibarry*, 231 F.3d at 1193. Where conduct is ambiguous, a requirement of purpose or intention properly prevents prosecutions for potentially innocent conduct. For example, in the immigration context, without the requirement of specific intent, previously deported individuals approaching the border of the United States merely to request information as to how to apply for re-entry could be charged with attempted illegal reentry under 8 U.S.C. § 1326(a). This scenario is not merely hypothetical. In *United States v. Morales-Tovar*, 37 F. Supp. 2d 846 (W.D. Tex. 1999), when defendant Morales-Tovar went to a port of entry and requested an application for a resident alien card he was arrested under § 1326(a) even though he did not apply for admission to the United States.

2. An Overt Act Which Is A Substantial Step Towards Completion Of The Crime. Because the overt act is what moves an individual's unactionable thoughts into the realm of criminal attempt, the overt act consisting of a substantial step towards completion of a crime is an essential element of the offense. 2 LaFave, *supra* § 11.3, at 211. Given that this Court has long held that the essential elements of an offense must be alleged in an indictment, *see Carll*, 105 U.S. at 612, an indictment which fails to identify the overt act in an attempt prosecution is necessarily insufficient under the Fifth Amendment. This is not to say that an indictment must allege a litany of facts ranging from the vital to the mundane, nor must the government identify every fact it intends to introduce.[2] As the Fifth Circuit noted, "a defendant's constitutional *right* to know the offense with which he is charged must be distinguished from a defendant's *need* to know the evidentiary details establishing the facts of such offense." *United States v. Gordon*, 780 F.2d 1165, 1172 (5th Cir. 1986). However, a defendant's constitutional right to know the charged offense requires that the indictment "state all the facts and circumstances comprised in the definition of the offence, by the rule of the common law or statue on which the indictment is founded. And these must be stated with clearness and certainty, otherwise, the indictment will be bad." Archbold, *supra* at 88. Such clearness and clarity plainly require the indictment to set forth the overt act constituting a substantial step.

The instant case demonstrates that this is neither a weighty nor prejudicial requirement for the prosecution. If the substantial step was tendering false identification, the government need not state in the indictment that Respondent attempted to enter the country by showing a laminated, 2 inch

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[2] Contrary to Judge Reavley's concurrence below, Respondent does not claim the indictment is deficient because it "failed to charge him with attempt to enter illegally because it does not contain a laundry list of the actions he took in doing so." *United States v. Resendiz-Ponce*, 425 F.3d 729, 733 (9th Cir. 2005).

by 3 inch red and white Arizona driver's license in the name of his cousin, which he had obtained three days earlier. Instead, the prosecution is required only to identify the step taken, for example, that Respondent tendered false identification at a point of entry. It is only then that the indictment would set forth an essential element of criminal attempt – the overt act which constitutes a substantial step towards completion of the crime.

Respondent was indicted for attempting to enter the United States in violation of 8 U.S.C. § 1326(a). The indictment in its entirety reads as follows:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

JA at 8. Although Respondent was on notice that he was charged with attempting to enter, he was not apprised of the overt act that the prosecution would attempt to prove and against which he would have to defend. The indictment claims only that Respondent attempted to reenter the country after being deported. The indictment nowhere descends to the particulars of the charged offense. As the Ninth Circuit observed, there were any number of overt acts that the prosecution could have alleged including: physical crossing into a port of entry; tendering false identification; lying to officers; or successfully entering the country. The indictment in this case gave no such detail, and merely parroted the words of the statute, utterly failing to meet minimum constitutional requirements.

As a consequence, while Respondent may have known that he was charged with the generic crime of "attempted reentry,"

the indictment said nothing about what deed he had done to manifest that intent. That omission not only deprived him of the notice guaranteed by the constitutional requirement that each element be alleged, *see Russell*, 369 U.S. at 763, it also created one of the predicaments against which the Court warned in *Russell*: Respondent "'could ... be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.'" *See id.* at 770 (citation omitted).[3] If the substantial step is not alleged, the defendant can never know whether he was prosecuted based upon "facts ... found by ... the grand jury which indicted him." *See id.* Thus, even if the constitutionally-mandated apprisal function could be satisfied by the minimal allegations made here, the right to be tried on only the grand jury's actual findings is lost. And for the reasons explained in Respondent's brief, such an abrogation of the grand jury's function constitutes structural, rather than harmless error. Principal among those reasons is that there is no record on which to assess whether the grand jury found the necessary facts that are the basis for the charge and the absolute inevitability that a subsequent conviction will render any deficiency in an indictment harmless and result in a tautological application of the rule.

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[3] Yet another function of an indictment would also be compromised by the failure to allege a substantial step.

> It has long been recognized that there is an important corollary purpose to be served by the requirement that an indictment set "out the specific offence, coming under the general description," with which the defendant is charged. This purpose ... is "to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had."

Russell, 369 U.S. at 768 (quoting *Cruikshank*, 92 U.S. at 558). This function serves the interests of both the prosecution and the defense by permitting courts to exercise "enlightened judgment" as to the validity of a conviction. *See id.* at 769.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT A SUBSTANTIAL STEP IS AN ELEMENT OF AN ATTEMPTED REENTRY UNDER 8 U.S.C. § 1326.

A. The Court Of Appeals' Formulation Of The Elements Of An Attempted Reentry Offense Under 8 U.S.C. § 1326 Was Not Challenged Below And Is Not Properly Before The Court.

The Court of Appeals relied upon *Gracidas-Ulibarry* in determining that the offense with which Respondent was charged included, "as an essential element, that 'the defendant committed an overt act that was a substantial step toward reentering [the United States].'" *United States v. Resendiz-Ponce*, 425 F.3d 729, 731 (9th Cir. 2005) (quoting *Gracidas-Ulibarry*, 231 F.3d at 1196). In the district court, Respondent moved to dismiss the indictment for failure to allege an "overt act in furtherance of the attempted illegal reentry," JA at 10-12, and Petitioner responded by asserting that "the indictment sufficiently alleges an overt act." *See id.* at 15. Thus, Petitioner did not challenge the necessity to prove "an overt act that was a substantial step toward reentering [the United States]," *see Resendiz-Ponce*, 425 F.3d at 731, in the district court.

Nor did it do so in the Court of Appeals. Indeed, in that court, Petitioner conceded that a substantial step was properly included as an element of the charged offense of attempted reentry after deportation. The district court instructed the petit jury that the prosecution was obliged to prove, beyond a reasonable doubt, that the defendant "intentionally commit-t[ed] an overt act that was a substantial step towards re-entering the United States." *See* JA at 50. Prosecutors made no objection to this instruction as would be required for any criminal defendant to preserve an issue for appeal. Further, in its Response Brief in the Court of Appeals, Petitioner conceded that "[t]he district court properly instructed the jury with regard to the overt act." Brief of Appellee United States

at 20, *United States v. Resendiz-Ponce*, 425 F.3d 729 (9th Cir. filed Jan. 31, 2005) ("U.S. Br.").

Because Petitioner not only failed to challenge the substantial step element below but conceded the propriety of the district court's jury instruction on it, Petitioner has plainly waived any right to challenge its status as an element. *See generally Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002). *See also Ryder v. United States*, 515 U.S. 177, 188 (1995) (declining to reach harmless error argument that was not raised by the government below). Nor does any exception to the normal requirement that an issue be preserved below apply here. While the Court has "previously held that [a] claim [not pressed below] is preserved if made by the current litigant in 'the recent proceeding upon which the lower courts relied for their resolution of the issue, and [the litigant] did not concede in the current case the correctness of that precedent,'" *United States v. Vonn*, 535 U.S. 55, 58 n.1 (2002) (third alteration in original) (quoting *United States v. Williams*, 504 U.S. 36, 44-45 (1992)), Petitioner can meet neither of those criteria – which are listed in the conjunctive – here.

First, Petitioner cannot point to any previous objection it made in this case to the Court of Appeals' holding that a substantial step was required. As noted above, the Court of Appeals' opinion in the instant case derived its statement that a substantial step was an element from *Gracidas-Ulibarry*. *See Resendiz-Ponce*, 425 F.3d at 731 (quoting *Gracidas-Ulibarry*, 231 F.3d at 1196). Even more broadly, it is not at all clear that Petitioner, in *Gracidas-Ulibarry*, even opposed the imposition of a substantial step requirement.[4] Rather, it appears to have confined its arguments to its view that the *mens rea* for a section 1326 attempt should be general intent, the same as that required for "illegal reentry." *See Gracidas-Ulibarry*, 231 F.3d at 1194-95 (citing *Pena-Cabanillas v.*

[4] There would be little reason for Petitioner to do so, given how small a burden this represents and its intuitive fairness.

United States, 394 F.2d 785 (9th Cir. 1968)).[5] At a minimum, Petitioner failed to make plain its objection to the imposition of the "overt act" rule, and therefore did not adequately present the issue in "'the recent proceeding upon which the lower court[] relied for [its] resolution of the issue.'" *See Vonn*, 535 U.S. at 58 n.1. *See also Baldwin v. Reese*, 541 U.S. 27, 34 (2004) (declining to exercise its discretion to consider an argument that was not raised in the Court of Appeals or in petitioner's opposition to the petition for a writ of *certiorari*).

Second, because Petitioner also conceded the propriety of the district court's inclusion of the substantial step as an element in its charge to the petit jury, *see* U.S. Br. at 20 (9th Cir. filed Jan. 31, 2005), it cannot avail itself of this Court's opinion in *Williams*. While the Court in *Williams* found that review was not precluded by a similar, but not identical, concession in that case, it did so because the petitioner framed its concession in terms of an obligation imposed by Circuit authority that it had previously contested. *See United States v. Williams*, 504 U.S. 36, 44 (1992) (The government "conceded ... not that the responsibilities [the Circuit precedent] had imposed were proper, but merely that [the Circuit precedent] had imposed them – over the protests of the Government, but in a judgment that was nonetheless binding precedent for the panel below."). Here, however, the government did not merely assert that the petit jury instructions were correct in light of *Gracidas-Ulibarry*; it simply endorsed them without reservation or citation to authority. *See* U.S. Br. 20 (9th Cir. filed Jan 31, 2005). Based upon its concession, and its failure to object – at any

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[5] Although it describes its *mens rea* requirement for the offense of reentry as "general intent," *see Pena-Cabanillas v. United States*, 394 F.2d 785, 790 (9th Cir. 1968), *overruled on other grounds*, *United States v. Smith Baltiher*, 424 F.3d 901 (9th Cir. 2005), *Pena-Cabanillas* requires only that the defendant act voluntarily. *See id.* at 788-90. *But see Carter v. United States*, 530 U.S. 255, 269 (2000) (observing that general intent corresponds to knowledge as to the *actus reus*).

point – to a construction of section 1326's attempt offense as requiring a substantial step, the government has waived any argument that a section 1326 attempt does not require a substantial step.

B. The Court Of Appeals Correctly Held That A Substantial Step Is An Element Of A Section 1326 Attempt Offense.

Because "it is a general principle that a party cannot be punished for an evil design, unless he has taken some steps towards carrying it out," *Bannon v. United States*, 156 U.S. 464, 469 (1895), a substantial step toward commission of the underlying offense is a fundamental constituent of an attempt offense.

> One of the basic premises of the criminal law is that bad thoughts alone cannot constitute a crime. This is no less true as to an attempt, and thus it is not enough that the defendant have intended to commit a crime. There must also be an act, and not any act will suffice.

2 LaFave, *supra* § 11.4, at 218 (footnotes omitted). *Gracidas-Ulibarry*'s determination that a section 1326 attempt offense requires a substantial step vindicates this tradition. *See* 231 F.3d at 1192, 1196. *Accord United States v. De Leon*, 270 F.3d 90, 92 (1st Cir. 2001) ("'Attempt,' [in a section 1326 attempt prosecution] as elsewhere, ... requires ... a substantial step toward completing [the] entry.") (citing *Gracidas-Ulibarry*, 231 F.3d at 1195-96).[6]

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[6] Two Circuits have disagreed with *Gracidas-Ulibarry*'s formulation of the specific intent requirement imposed by section 1326's use of the term "attempt," in that *Gracidas-Ulibarry* found that Congress did not intend to punish aliens attempting to enter the United States when those aliens believed that they had permission to apply to enter the United States. *Compare Gracidas-Ulibarry*, 231 F.3d at 1196, *with United States v. Rodriguez*, 416 F.3d 123 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006), *and United States v. Morales-Palacios*, 369 F.3d 442 (5th Cir.), *cert. denied*, 543 U.S. 825 (2004). Neither *Rodriguez* nor *Morales-Palacios* address the substantial step issue, although both require a heightened mens rea, particularly when compared to the *Pena-Cabanillas*

Gracidas-Ulibarry determined that section 1326's attempt offense included, as an element, a substantial step based upon Congress's use of the word "attempt," a term with a well-established common law meaning. *See Gracidas-Ulibarry* 231 F.3d at 1192 ("The common law meaning of 'attempt' is the specific intent to 'engage in criminal conduct and ... an overt act which is a substantial step towards committing the crime.'") (omission in original) (quoting *United States v. Arbelaez*, 812 F.2d 530, 534 (9th Cir. 1987)). As illustrated in Part I.B., *supra*, the Ninth Circuit's interpretation of the term "attempt" enjoys widespread support.

The Court's decision in *Carter v. United States*, 530 U.S. 255 (2000), supports *Gracidas-Ulibarry*'s reliance on the common law meaning of the term "attempt." As a threshold matter, section 1326 does not define the term "attempt" and there is no other federal statutory definition of the term upon which courts can rely. *See generally United States v. Dworken*, 855 F.2d 12, 16 (1st Cir. 1988). Resort to interpretive aids is therefore required.

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voluntariness standard. *See Rodriguez*, 416 F.3d at 128 (approving allegation that defendant "'knowingly and intentionally attempted to enter'"); *Morales-Palacios*, 369 F.3d at 449 (stating that "it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter"). *Cf. Bailey*, 444 U.S. at 405 (determining that attempts require a "heightened mental state").

Although *Morales-Palacios* did not explicitly address the substantial step requirement, it suggested that it would apply a particularly rigorous approach to that element. Specifically, the Fifth Circuit found that the conduct of an alien who approached the border and asked questions of border personnel was "insufficient for an attempted entry because ... 'there [was] no evidence that the defendant actually applied for admission to the United States.'" *Morales-Palacios*, 369 F.3d at 448 n.4 (quoting *United States v. Morales-Tovar*, 37 F. Supp. 2d 846, 851 (W.D. Tex. 1999) (alteration in original)). Thus, the Fifth Circuit requires a substantial step that leaves no doubt about the defendant's intent to reenter the United States. *Compare Resendiz-Ponce*, 425 F.3d at 733 (noting that "[p]hysical crossing into a government inspection area is ... a substantial step toward entry into the United States").

Carter teaches that "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law." 530 U.S. at 264. Under *Carter*, then, the question is not whether section 1326 describes an offense based upon an analogous common law crime, but rather whether Congress has used a common law term. *See id.* at 265 ("a 'cluster of ideas' from the common law should be imported into statutory text only when Congress employs a common-law *term*"). *See also Evans v. United States*, 504 U.S. 255, 260 n.3 (1992) ("[A]s Justice Frankfurter advised, 'if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.'") (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)). By employing the word "attempt," Congress imported a "cluster of ideas" from the common law, one of which is the notion that a substantial step is an element of every attempt offense. *See Gracidas-Ulibarry*, 231 F.3d at 1193 n.7 ("Here, of course, § 1326 does use the well-established common law term, 'attempts.'"). *See also id.* at 1193 ("Neither the text of § 1326 nor its legislative history gives any indication that Congress intended not to incorporate the common law meaning of the term 'attempts' into the crime of attempted illegal reentry.").

But even if reliance on the common law meaning of the term "attempt" were unwarranted, the Ninth Circuit's interpretation of the term is nonetheless consistent with the current meaning attributed to the term. Indeed, in the context of construing a statute closely related to section 1326 – 8 U.S.C. § 1101(a)(43)(U)[7] – the Second Circuit concluded that "the modern meaning of 'attempt' has evolved from the classic common-law definition of the term, and the elements of intent and a substantial step toward commission set out in

[7] The maximum sentence of a defendant convicted under 8 U.S.C. § 1326(a) turns on whether the alien was removed after having suffered a conviction for an offense qualifying as an aggravated felony under 8 U.S.C. § 1101(a)(43). *See* 8 U.S.C. § 1326(b)(2).

the Model Penal Code make up the most commonly used 'attempt' definition today." *See Ming Lam Sui v. INS*, 250 F.3d 105, 116 (2d Cir. 2001). *Accord United States v. Martinez-Garcia*, 268 F.3d 460, 465-66 (7th Cir. 2001) (adopting the analysis in *Ming Lam Sui*). The Model Penal Code formulation discussed in *Ming Lam Sui* is entirely consistent with the substantial step element as described in *Gracidas-Ulibarry*:

> A person is guilty of an attempt to commit a crime if, ... he ... purposely does or omits to do anything that, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime.

Am. Law Inst., *Model Penal Code*, § 5.01(1)(c) (1962). *See also id.* at § 5.01(2) (the substantial step must be "strongly corroborative of the actor's criminal purpose").

Finally, the construction of section 1326's attempt offense to include a substantial step element vindicates the Court's concern in *Bannon* that a defendant not be convicted solely for an "evil design, unless he has taken some steps towards carrying it out." *Bannon*, 156 U.S. at 469.

> The corroborative behavior [evidenced by a substantial step] is ... always a required element; without it, "firmness of purpose" cannot be guaranteed. That is, until the corroborative step is taken, there is insufficient indication, or proof, that the actor would actually follow through on a criminal design, even if that design has been affirmatively expressed.

Dworken, 855 F.2d at 17 n.3. *Accord United States v. Cruz-Jiminez*, 977 F.2d 95, 102 n.11 (3d Cir. 1992). The Ninth Circuit was correct in holding that a substantial step is an element of an attempt offense under section 1326.

C. The Ninth Circuit Correctly Held That The *Mens Rea* For An Attempted Reentry Under Section 1326 Is The Intent To Reenter Without The Permission Of The Attorney General Or His Successor.

Gracidas-Ulibarry holds that to support a conviction for attempted reentry under 8 U.S.C. § 1326, the government must demonstrate, *inter alia*, that "the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General [or his designated successor]." *Gracidas-Ulibarry*, 231 F.3d at 1196. Two Circuits have disagreed, holding that the applicable *mens rea* is the intent to reenter the United States. *See United States v. Rodriguez*, 416 F.3d 123, 128 (2d Cir. 2005) (approving allegation that defendant "'knowingly and intentionally attempted to enter'"); *United States v. Morales-Palacios*, 369 F.3d 442, 449 (5th Cir. 2004) ("it is sufficient that the government demonstrates that a previously deported alien knowingly intended to reenter").[8] The instant case is not the appropriate vehicle to resolve this Circuit split; neither party raised the issue below,[9] and the question upon which the

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[8] *Gracidas-Ulibarry* rejected the Eleventh Circuit's decision in *United States v. Peralt-Reyes*, 131 F.3d 956 (11th Cir. 1997) (per curiam), as "provid[ing] no analysis other than the court's adoption of the holding of an unpublished First Circuit decision which has no precedential value." *See Gracidas-Ulibarry*, 231 F.3d at 1195 (citing *Peralt-Reyes*, 131 F.3d at 957 and *United States v. Reyes-Medina*, No. 94-1923, 1995 WL 247343 (1st Cir. Apr. 25, 1995)).

[9] The government has waived any challenge to *Gracidas-Ulibarry*'s formulation of the *mens rea* element. The Court "'will not review a question not pressed *or* passed on by the courts below.'" *Williams*, 504 U.S. at 42 (quoting *Springfield v. Kibbe*, 480 U.S. 257, 266 (1987)). The government never "pressed" the issue of the *mens rea* element; it never contended that *Gracidas-Ulibarry* was wrongly decided. Even so, *Williams* permits review where the lower court "passed" on the issue. *See Williams*, 504 U.S. at 43-45. While "[t]here [was] no doubt [in *Williams*] that the [lower court] decided the crucial issue," *id.* at 43, the same cannot be said here: Respondent's appeal addressed only the substantial step issue; the Court of Appeals did not "pass" on any *mens rea* issue. *See*

Court initially granted the petition for a writ of *certiorari* – whether a preserved objection to the omission of an element from the indictment was subject to harmless error review – concerned only the failure to allege a substantial step. As discussed above, there can be little dispute that such a substantial step is an element of every attempt offense, regardless of which formulation of the *mens rea* element is correct. Nevertheless, should the Court reach the issue, it should hold that the Ninth Circuit has correctly described the *mens rea* element for an attempted reentry under section 1326.

Gracidas-Ulibarry's holding that attempted reentry into the United States requires a showing that "the defendant had the purpose, i.e., conscious desire, to reenter the United States without the express consent of the Attorney General [or his designated successor]," *see Gracidas-Ulibarry*, 231 F.3d at 1196, is compelled by the Court's cases. First, it derives a specific intent requirement from the Court's cases holding that Congress's use of a common law term indicates incorporation of the term's common law meaning. *See, e.g.*, *Carter*, 530 U.S. at 264. Second, it relies upon the Court's unwillingness to construe statutes not to require *mens rea* where the statute reaches a substantial amount of innocent conduct: "*Morissette*, reinforced by *Staples*, instructs that the presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994) (citing *Staples v. United States*, 511 U.S. 600 (1994), and *Morissette v. United States*, 342 U.S. 246 (1952)).

1. Congress' Use Of The Common Law Term "Attempt" Imported A "Cluster Of Ideas" From The Common Law, Including The Necessity To Prove Specific Intent In An

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Resendiz-Ponce, 425 F.3d at 731-33. Thus, the *Williams* exception to the normal rule that only preserved issues are subject to review by the Court is inapplicable.

Attempt Offense. *Gracidas-Ulibarry* first analyzed the common law background of the term attempt, *see* 231 F.3d at 1192-94, as is required by *Carter*. *See* 530 U.S. at 265 ("a 'cluster of ideas' from the common law should be imported into statutory text only when Congress employs a common-law *term*").[10] *Accord Whitfield v. United States*, 543 U.S. 209, 213 (2005) ("'absent contrary indications, Congress intends to adopt the common law definition of statutory terms'"). Based upon that background, the Ninth Circuit concluded that an attempt under section 1326 was a specific intent crime. *See Gracidas-Ulibarry*, 231 F.3d at 1192. Indeed, the Court has recognized that such offenses traditionally require a heightened *mens rea*. *See Bailey*, 444 U.S. at 405 ("[T]he law of inchoate offenses such as attempt and conspiracy [requires] a heightened mental state [that] separates criminality itself from otherwise innocuous behavior.") (citing Model Penal Code § 2.02 cmt. at 125

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[10] The Second and Fifth Circuits misunderstand, or perhaps simply overlook, *Carter* when they suggest that the fact "that § 1326 defines a statutory offense rather than enshrining in statute a common law offense" somehow "liberate[s]" the terms of the statute "from their common law meanings." *See Rodriguez*, 416 F.3d at 126 (citing *Morales-Palacios*, 369 F.3d at 447). In fact, those courts have the rule in *Carter* exactly backward. *Carter* focuses on the use of a common law *term*, not the question of whether a statute covers a common law offense. *See* 530 U.S. at 264. That is why the Court did not construe the bank robbery statute at issue to adopt the common law, even though the statute concerned a common law crime. *See id.* at 266-67. In short, the Court has "not hesitated to turn to the common law for guidance when the relevant statutory text does contain a term with an established meaning at common law." *Id.* at 266 (citation omitted). In contrast, the approach taken by the Second and Fifth Circuits counsels in favor of ignoring, rather than turning to, the common law when a common law *term* is employed, unless a common law offense is involved, *see Rodriguez*, 416 F.3d at 126 (acknowledging that "the common law generally imposes a heightened *mens rea* requirement for attempt crimes" but then ignoring that "established meaning"), while *Carter* requires consideration of the common law if common law terms are employed, regardless of the subject matter of the statute.

(Tent. Draft No. 4, 1955)). Specific intent is thus, one of the "cluster of ideas" associated with the common law term "attempt." *Gracidas-Ulibarry* therefore relied on *Bailey* to conclude that "[t]he reason for requiring specific intent for attempt crimes is to resolve the uncertainty whether the defendant's purpose was indeed to engage in criminal, rather than innocent, conduct." *See* 231 F.3d at 1193. "This accepted common law definition is the basis for the doctrine that the crime of attempt requires a showing of specific intent even if the completed crime does not." *Id.* at 1192 (internal quotation marks deleted) (quoting *United States v. Hadley*, 918 F.2d 848, 853 (9th Cir. 1990) and citing *United States v. Sneezer*, 900 F.2d 177, 179 (9th Cir. 1990), and 4 Charles E. Torcia, *Wharton's Criminal Law* § 695, at 591-97 (15th ed. 1996)).[11] By construing section 1326 to require that the government prove that the alien intended to enter without permission, *Gracidas-Ulibarry* vindicates the fundamental concerns identified in *Bailey*.

2. The Background Presumption Of Mens Rea Supports The Ninth Circuit's Construction Of The Section 1326 Attempt Offense To Require An Intent To Enter Without The Requisite Permission Because Any Other Construction Would Criminalize A Broad Range Of Innocent Conduct. The Ninth Circuit's construction is also supported by the Court's "presumption in favor of a scienter requirement [that] should apply to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video, Inc.*, 513 U.S. at 72. In *Staples v. United States*, 511 U.S. 600 (1994), the Court applied that presumption to the offense of possessing a machine gun in violation of 26 U.S.C. § 5861(d). Observing that statutory silence does not necessarily suggest

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[11] *See also* 2 LaFave, *supra* § 11.3(c) at 216 ("[E]ven if the completed crime may be committed without intent, knowledge, recklessness, or even negligence, the same is not true of an attempt to commit that crime. An attempt to commit a strict liability offense is thus possible only if it is shown that the defendant acted with an intent to bring about the proscribed result.").

that Congress intended to dispense with a conventional *mens rea* element, which would require that the defendant know the facts that make his conduct illegal, 511 U.S. at 605, *Staples* found that "'[t]he existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence.'" *Id.* (alteration in original) (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978), and *Morissette*, 342 U.S. at 250).

In rejecting the government's claim that the firearm statute was a public welfare offense traditionally exempt from the *mens rea* requirement, the Court referred to several characteristics of the gun statute in requiring *mens rea.* Criminalizing mere possession would "'criminalize a broad range of apparently innocent conduct.'" *Id.* at 610 (quoting *Liparota v. United States*, 471 U.S. 419, 426 (1985)). Guns are not subject to a long tradition of regulation such as "'deleterious devices or products or obnoxious waste materials.'" *Id.* at 610-11 (quoting *United States v. Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)). While potentially dangerous, guns are not intrinsically dangerous and subject to such intense regulation as other recognized areas of regulation. *Id.* at 611-12. In contrast to the history of enforcing public welfare regulations with only fines or short jail sentences, the potentially harsh penalty attached to conviction – up to ten years imprisonment – was "a significant consideration in determining whether the statute should be construed as dispensing with *mens rea.*" *Id.* at 616. Consequently, *Staples* held that *mens rea* as to the facts that rendered the defendant's conduct unlawful was required. *See id.* at 619.

The Court applies the same analysis to the determination of whether a statute should be construed to require a specific intent element. *See Carter*, 530 U.S. at 269. In *Carter*, the Court noted that "some situations may call for implying a specific intent requirement into statutory text." *See id.* Specifically, the Court cautioned against construing a stature

to require only general intent if the "statute would run the risk of punishing seemingly innocent conduct." *See id.*

The concerns identified in *Carter* animated the Ninth Circuit's decision in *Gracidas-Ulibarry*: its construction was informed by the concern that if it failed to construe the statute to require specific intent, "lawful conduct could be swept within the proscription of the statute." *See* 231 F.3d at 1194. Absent a requirement that the defendant intended to enter the United States without permission, the Ninth Circuit noted that individuals seeking to comply with INS regulations may well be subject to liability.

> If attempted reentry were a general intent crime, a previously deported alien intercepted on the way to, or even at, the port of entry to make ... a request [for permission to reapply] or to pick up [waiver] forms could be prosecuted under § 1326. True, the alien could try to explain that his or her intent was to comply with the law, not to violate it; but the government would not have to prove beyond a reasonable doubt that the alien's true purpose was to break the law.

Id. Thus, *Gracidas-Ulibarry* applied a "presumption in favor of a scienter requirement ... to each of the statutory elements that criminalize otherwise innocent conduct." *X-Citement Video, Inc.*, 513 U.S. at 72 Specifically, it requires the intent to enter and knowledge as to the lack of permission to reapply.

The Ninth Circuit illustrated its concerns by citing *Morales-Tovar*, 37 F. Supp. 2d 846. In *Morales-Tovar*, a previously deported alien went to a port of entry with his Mexican birth certificate and asked to reapply for a resident alien card. *See id.* at 847-48. Although he did not apply for admission, he was arrested and prosecuted for attempted reentry. Absent a requirement that the alien intend to enter without permission, section 1326's attempt offense would reach the innocent conduct described in *Morales-Tovar*. *See Gracidas-Ulibarry*, 231 F.3d at 1194; *Morales-Tovar*, 37 F. Supp. 2d at 851.

3. The Approach Taken By The Second And Fifth Circuits Disregards Carter *And Fails To Apply The Background Presumption Of* Mens Rea. The Second and Fifth Circuits do not persuasively argue that Congress intended to subject innocent conduct, such as that of the defendant in *Morales-Tovar*, to felony prosecution.[12] First, as noted above, those courts misapply *Carter*'s rule of statutory construction: they erroneously disregard the common law meaning of the statutory term "attempt." *See Carter*, 530 U.S. at 264. Nor does the fact that section 1326 is a statutory, rather than common law, offense suggest that the background presumption of *mens rea* does not apply. In fact, the Court has repeatedly adopted constructions including *mens rea* requirements in purely statutory offenses. *See, e.g., Posters 'N' Things, Ltd. v. United States*, 511 U.S. 513 (1994) (drug paraphernalia); *Staples*, 511 U.S. 600 (possession of unregistered firearms); *Liparota v. United States*, 471 U.S. 419 (1985) (unlawful acquisition and possession of food stamps); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (antitrust violations).[13]

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[12] The Fifth Circuit's attempt to account for the result in *Morales-Tovar* is singularly unpersuasive. Rather than rely upon that defendant's innocent intent, *Morales-Palacios* claims that the *Morales-Tovar* defendant is not liable because he made no application for admission. *See Morales-Palacios*, 369 F.3d at 448 n.4. That approach, however, would lead to incongruous results. For instance, if a previously deported alien were in line at a port of entry, intending to attempt to enter by making a false claim to citizenship and knowing full well that he lacked permission to reapply, but was recognized as a deportee by border personnel before he applied for entry, the Fifth Circuit would apparently hold that he has not violated section 1326. The Ninth Circuit's interpretation, however, would permit conviction of that defendant, but would not reach the innocent conduct of the *Morales-Tovar* defendant. *See Resendiz-Ponce*, 425 F.3d at 733 (noting that "[p]hysical crossing into a government inspection area is ... a substantial step toward entry into the United States").

[13] *See also Posters 'N' Things*, 511 U.S. at 523 ("Even statutes creating public welfare offenses generally require proof that the defendant had

Second, *Rodriguez* and *Morales-Palacios* erroneously rely on deportation proceedings themselves to conclusively presume that all section 1326 defendants are aware that they lack permission to reapply for admission. *See Rodriguez*, 416 F.3d at 128; *Morales-Palacios*, 369 F.3d at 448. As a threshold matter, not all section 1326 defendants have had deportation (or removal) proceedings; section 1326 also applies to aliens who have merely been "denied admission." *See* 8 U.S.C. § 1326(a)(1). Even if a defendant is granted an actual hearing, the Second Circuit's inference of knowledge from INS "practices" is problematic given the frequent defects in these streamlined administrative proceedings. *See, e.g.*, *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1047 (9th Cir. 2004) (proceedings not translated); *United States v. Lopez-Vasquez*, 1 F.3d 751 (9th Cir. 1993) (mass deportation hearing with waivers of rights by silence). But even a perfect deportation hearing is unlikely to inform an alien like Morales-Tovar that he may subject to liability for a twenty-year maximum felony if he requests the Attorney General's permission to reapply for admission at a port of entry. At any rate, the Court has held that, in an escape case, the prosecution must demonstrate "that an escapee knew his actions would result in his leaving physical confinement without permission." *See Bailey*, 444 U.S. at 408. It would be anomalous if Congress were, by its silence as to *mens rea*, to treat an alien wishing to reapply for admission with less solicitude than an inmate seeking to leave custody. Knowledge of the lack of permission should be an element as to both offenses.

Nor can the Second Circuit's claim that "the clarity of the statutory language," *see Rodriguez*, 416 F.3d at 128, supports rejection of the well-established common law meaning of that statutory term "attempt" be reconciled with the Court's *mens rea* cases. "'Certainly far more than the simple omission of

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knowledge of sufficient facts to alert him to the probability of regulation of his potentially dangerous conduct.").

the appropriate phrase from the statutory definition is necessary to justify dispensing with an intent requirement.'" *Posters 'N' Things*, 511 U.S. at 522 (quoting *United States Gypsum*, 438 U.S. at 438). *Accord Liparota*, 471 U.S. at 426 ("the failure of Congress explicitly and unambiguously to indicate whether *mens rea* is required does not signal a departure from [the] background assumption [of *mens rea*]") (emphasis omitted).

Finally, imposition of liability despite an alien's good belief in his permission to reapply to reenter is analogous to strict liability and would improperly expand the public welfare doctrine to encompass attempted illegal reentry. The Court should reject any such expansion. Public welfare offenses giving rise to strict liability are those designed to criminalize "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety." *Liporata*, 471 U.S. at 433. To determine if a statute "defines a public welfare offense, a court must have in view some category of dangerous and deleterious devices that will be assumed to alert an individual that he stands in 'responsible relation to a public danger.'" *Hanousek v. United States*, 528 U.S. 1102, 1103 (2000) (Thomas, J., dissenting from denial of petition for a writ of certiorari) (citing *Staples*, 511 U.S. at 613 n.6). As such, public welfare offenses regulate "dangerous or deleterious devices or products or obnoxious waste materials." *United States* v. *Int'l Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1997).

No matter how acrimonious the immigration debate has become in this country, we have certainly not sunk to labeling human beings as "obnoxious waste materials." Despite the longstanding and near total control Congress has exercised over immigration matters, that regulation is of a qualitatively different type than that exercised to regulate shipments of legal drugs, *see United States v. Dotterweich*, 320 U.S. 277, 281 (1943) (imposing strict liability for shipments of

misbranded or adulterated drugs), or waste materials, *see International Minerals & Chem.*, 402 U.S. at 565. This Court has not construed the public welfare doctrine so broadly as to hold "that any statute can be described as creating a public welfare offense so long as the statute regulates conduct that is known to be subject to extensive regulation and that may involve a risk to the community." *Hanousek*, 528 U.S. at 1104 (Thomas, J., dissenting).

Further, strict liability is inappropriate where severe sanctions can be imposed. In *United States Gypsum*, 438 U.S. at 442 n.18, the Court observed that the "severity of the[] sanctions" available under the Sherman Act, 3 years in prison and large fines, supported the conclusion that strict liability was inappropriate. *Accord X-Citement Video*, 513 U.S. at 72 (10 years); *Staples*, 511 U.S. at 616-17 (10 years). *See also* Francis B. Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55, 72 (1933) ("To subject defendants entirely free from moral blameworthiness to the possibility of prison sentences is revolting to the community sense of justice ...."); *Hanousek*, 528 U.S. at 1103-04. The maximum sentence for a violation of section 1326 is twenty years, *see* 8 U.S.C. § 1326(b)(2), yet neither the Second nor Fifth Circuits address the incongruity in imposing such severe punishments for potentially innocent conduct.[14]

CONCLUSION

The judgment of the Ninth Circuit should be affirmed.

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[14] As a final consideration, this Court has also noted that "requiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Liparota*, 471 U.S. at 427 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)).

Respectfully submitted,

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